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Supreme Court, U. S.
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NO.____

in the

Supreme Court of the United States

OCTOBER TERM, 1980

GERALD WEINGARDEN, D.O.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Information fails to state an offense thereby rendering the conviction a nullity.

2. Whether the conflict among the Circuits with respect to statutory interpretation should be resolved for the sake of uniformity, due process, and equal protection.

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II. The Conflict Among the Circuits Should be Resolved, the Decision Reached in the Sixth Circuit Should be Overruled and the Result Reached by the Fifth Circuit Should be Adopted 19

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GERALD WEINGARDEN, D.O.,
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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit.

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Your petitioner, Gerald Weingarden, D.O., prays that a writ of certiorari issue to the United States Court of Appeal for the Sixth Circuit to review its decision entered on the 19th day of August, 1980, affirming petitioner's conviction under 42 U.S.C. Section 1396h(b)(1).

JURISDICTION

The unpublished decision of the Court of Appeals was entered on August 19, 1980. The petition has been timely filed. Jurisdiction of this Court is invoked under 28 U.S.C. Sec 1254(1).

STATEMENT OF THE CASE

Nature of the Case and its Disposition

On September 21, 1978, an indictment was filed against defendant-appellant Dr. Gerald Weingarden, a doctor of osteopathy, and twelve other defendants. On February 2, 1979, a Follow Up Information was filed charging Dr. Weingarden in Counts 1 through 10 with violations of 42 U.S.C. Section 1396h(b)(1) (1972), for the alleged illegal receipt of "Medicaid Kickbacks." An Amended Follow Up Information was subsequently filed.

On March 16, 1979, the Honorable Cornelia G. Kennedy denied the motion of one defendant to dismiss the charges, which motion incorporated by reference other defendants' motions to dismiss.

Relying in part upon *United States v. Porter,* 591 F.2d 1048 (5th Cir. 1979) decided on March 21, 1979, Dr. Weingarden orally moved for rehearing of the motions to dismiss. On April 5, 1979, the trial court entered a seven page Opinion and Order Denying Defendants' Motion for Rehearing.

On April 10, 1978, Dr. Weingarden entered a plea to Counts 3 through 7 of the Follow Up Information. Pursuant to *North Carolina v. Alford,* 400 U.S. 25 (1970), Dr. Weingarden disavowed any wrongdoing, but under the circumstances, chose to waive his right to trial.

A Motion in Arrest of Judgment and Memorandum in Support thereof were filed on May 23, 1979, and denied on May 31, 1979.

On June 22, 1979, sentence was pronounced, the effect of which was to remand Dr. Weingarden to the custody of the Attorney General for 45 days and place the doctor in a work-release program within the City of Detroit. A fine of $10,000 was imposed on each of the five counts. The remaining Counts of the Information were dismissed.

A notice of appeal was timely filed on June 25, 1979. The conviction was affirmed by the Sixth Circuit Court of Appeals by order dated June 16, 1980 (App. "A"), and rehearing denied by order dated August 19, 1980 (App. "B").

STATEMENT OF THE FACTS

The Amended Follow Up Information and portions of the indictment which were adopted therein detail the claimed kickback scheme as follows:

Dr. Weingarden received consulting fees from Spartan Laboratories, Inc., and sent laboratory business to Titan Laboratories, Inc., a laboratory related to

Spartan. Titan analyzed bodily fluid specimens obtained from patients who qualified for Medicaid assistance. The claims filed by Titan regarding such patients were in accordance with the Medicaid statutes and regulations, and the monies received by Titan Laboratories were those to which Titan was entitled; that is, when Titan requested payment for specific specimen analysis, the analysis had been performed and the billing for the analysis was in accordance with Medicaid statutes and regulations.

Dr. Weingarden joined a corporation known as J.K.F., at the suggestion of three individuals: Henry Ellis, a stockholder and member of the board of directors of Titan Laboratories, Inc.; Sanford Hoskow, a vice-president, director and salesman for Titan; and John Leeming. J.K.F. was to purchase 40% of the stock of Titan for $75,000. Dr. Weingarden was one of a group of doctors who would share the 40% ownership in Titan. The doctors-stockholders sent their laboratory business to Titan. Titan sent an amount equal to 10% of the gross billings of J.K.F. to Joseph Donnelly, an attorney who had developed the J.K.F. vehicle and who represented the doctors. Donnelly maintained an escrow account on behalf of J.K.F. When the escrow account reached $60,000, the members of J.K.F. paid $15,000 to Titan and thereby effectuated the final purchase of their 40% of the stock of Titan.

The receipt of the consulting fees was alleged to have constituted the receipt of "kickbacks" in violation of 42 U.S.C. Section 1396h(b)(1) which provides:

(b) Whoever furnishes items or services to an individual for which payment is or may be made in whole or in part out of Federal funds under a State plan approved under this subchapter and who solicits, offers, or receives any —

(1) kickback or bribe in connection with the furnishing of such items or services or the making or receipt of such payment,

. . . shall be guilty of a misdemeanor.

REASONS FOR GRANTING THE WRIT

I.

FOR THE REASON THAT PROPER APPLICATION OF THE ESSENTIAL RULES OF STATUTORY CONSTRUCTION MUST BE UNIFORMLY INTERPRETED, THE INFORMATION FAILS TO STATE AN OFFENSE.

Resolution of the question turns upon the proper construction to be given 42 U.S.C. Section 1396h(b)(1), which at the relevant time provided in pertinent part:

(b) Whoever furnishes items or services to an individual for which payment is or may be made in whole or in part out of Federal funds under a State plan approved under this subchapter and who solicits, offers, or receives

> any — (1) kickback or bribe in connection with the furnishing of such items or services or the making or receipt of such payment,
>
> . . . shall be guilty of a misdemeanor.

Three decisions, *United States v. Zacher,* 586 F.2d 912 (2d Cir. 1978); *United States v. Porter,* 591 F.2d 1048 (5th Cir. 1979); and *United States v. Hancock,* 604 F.2d 999 (7th Cir. 1979), have construed the terms "kickback" and "bribe" in 42 U.S.C. Section 1396h(b)(1) as well as 42 U.S.C. Section 1395nn(b)(1), which shares the same language and legislative history.

In *United States v. Zacher,* 586 F.2d 912 (2d Cir. 1978) the Court reversed convictions for receipt of bribes in connection with providing Medicaid services. The government charged that supplementary payments from the families of Medicaid patients in return for nursing home services from Zacher were "bribes" within the meaning of 42 U.S.C. Section 1396h(b)(1). Since the statute fails to define the term "bribe," the Court looked to similar statutes, the common law, and common sense for aid in its interpretation and followed the reasoning of Justice Jackson in *Morissette v. United States,* 342 U.S. 246, 263 (1952):

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial

> mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

Upon surveying the jurisprudence on bribery, the Second Circuit concluded that "courts have consistently understood the word 'bribe' to encompass acts that are *malum in se* because they entail either a breach of trust or duty or the corrupt selling of what our society deems not to be legitimately for sale. . . . It is this element of corruption that distinguishes a bribe from a legitimate payment for services." *United States v. Zacher, supra,* 586 F.2d at 916. The Court concluded that "[t]he receipt of supplemental payments when a patient was eligible for Medicaid rather than private insurance similarly would not, without more, constitute the taking of a bribe. Therefore, even if Congress had intended to outlaw such practices, it did not succeed in doing so by passage of Section 1396h(b)." 586 F.2d at 916. In fact, the Second Circuit found that such as assumption as to Congressional intent could not properly be entertained:

> The legislative history is sparse and inconclusive. However the design of the statute itself may be taken as indicative of the scope Congress intended the provision to have. A statutory term may gather meaning from the words around it. *Jarecki v. G. D. Searle & Co.,* 367 U.S. 303, 307, 81 S.Ct. 1579, 6 L.Ed.2d 859 (1961). Section 1396h(b) (1972) made criminal transactions involving kickbacks, bribes and rebates in connection with the furnishing of Medicaid services. *Kickbacks, rebates and*

> *bribes cover a variety of transactions which, while not prohibited by 18 U.S.C. Section 201 [Bribery of Public Officials and Witnesses] unless a public official is involved, would involve the misapplication of federal funds. As we understand the terms, they each involve a corrupt payment or receipt of payment in violation of the duty imposed by Congress on providers of services to use federal funds only for intended purposes and only in the approved manner.* The payments to Zacher did not increase the cost to the government of patient care, decrease the quality of patient care purchased by the government or involve the misapplication of government funds. [Emphasis supplied]
>
> * * *
>
> Because there is no showing that "bribe" in Section 1396h(b) 1972 was intended to encompass more than at common law or in common usage, we hold that Congress did not reach the receipt of payments such as those accepted by Zacher.

The analysis in *Zacher* regarding the term "bribery" in Section 1396h(b)(1) applied with equal force to the term "kickback" which ordinarily means the secret return of a part of a sum received. The *New Merriam-Webster Collegiate Dictionary* (1975). The "Return" means to give or send back to an earlier possessor. *Id.*

Thus, in *United States v. Porter,* 591 F.2d 1048 (5th Cir. 1979), the Court held that the facts alleged in the indictment did not constitute "kickbacks" within the

meaning of 42 U.S.C. Section 1395nn(b). "In ordinary parlance, a kickback is the secret return to *an earlier possessor* of part of a sum received." *United States v. Porter, supra,* 591 F.2d at 1054. [Emphasis as in original.] The following was alleged in *Porter:*

> Eight doctors and one laboratory operator were charged with offering and receiving kickbacks or bribes in connection with Medicare services. The challenged activities involved payments entitled "handling fees" by laboratories to the doctors, either directly or through dummy corporations, in return for submitting blood specimens from Medicare beneficiaries. The laboratories were reimbursed for blood specimen analysis by Blue Shield, which had contracted with the Department of Health, Education and Welfare, the agency responsible for administering the Medicare program.
>
> Porter, the key figure in these activities, established Southeastern Medical Laboratories, 60% of which was owned by three of the defendants. One of the three defendants arranged to form a corporation known as Medical Administrative Services, the only function of which was to act as a conduit to handle the money from the laboratories to the doctors. Porter also established Laboratories of Florida in which a co-defendant physician held 60% of the stock. The laboratories sent money to the dummy corporation which then issued checks to the doctors who had submitted the specimens of Medicare patients to the laboratories.
>
> The doctors in *Porter* regularly submitted specimens to manual laboratories, which performed one

test at a time on each specimen, rather than automated laboratories, which performed a battery of tests on each specimen and charged far less than the manual laboratories. The manual laboratories paid the doctors up to $35.00 for each blood sample. The government charged that these payments were "bribes, kickbacks, or rebates" in violation of 42 U.S.C. Section 1395nn(b)(1) which provided at that time:

> Whoever furnishes items or services to an individual for which payment is or may be made under this subchapter and who solicits, offers, or receives any—
>
> (1) kickback or bribe in connection with the furnishing of such items or services or the making or receipt of such payment, or
>
> (2) rebate of any fee or charge for referring any such individual to another person for the furnishing of such items or services,
>
> shall be guilty of a misdemeanor . . .

Following a jury trial, Porter and two doctors were found guilty of having violated Section 1395nn(b)(1).

On appeal, the Fifth Circuit held that the indictment failed to state an offense. Noting that there was "no accumulation of jurisprudence on the actual meaning of the words 'kickback' and 'bribe' as used in this statute," and that the case represented "the first prosecution under this statute," the Court resorted to two axiomatic principles of statutory construction: (1) a

statute must be construed strictly against the prosecution and in favor of the accused, citing *Smith v. United States,* 360 U.S. 1 (1959), and (2) "[i]f there is a fair doubt as to whether a defendant's conduct is embraced in the prohibition, the policy of lenity requires that the doubt be resolved in favor of the accused," citing *Ladner v. United States,* 358 U.S. 169, 178 (1958). *Porter,* 591 F.2d at 1053. Applying these principles and relying upon *United States v. Zacher, supra,* the Fifth Circuit concluded:

> [T]he receipt of the money by the labs in no way violated the law. What the government complains of is that once the labs lawfully received a lawful fee they shared it with a doctor who had referred the specimen to the lab. Yet, there was no outstanding restriction on what the lab could do with the money once it received it.

The reasoning in *Porter* is controlling. The Information alleges that Dr. Weingarden "received monetary payments labelled 'consulting fees' " from a laboratory which had been reimbursed for analysis of specimens sent by Dr. Weingarden, which reimbursement was "in accordance with the Medicaid statutes and regulations." Such a transaction is not a "kickback." The common meaning of "kickback" does not encompass the receipt of money by someone other than an earlier possessor of the money:

> [T]he acts alleged in the indictment did not constitute 'kickbacks' within the meaning of 42 U.S.C. Section 1395nn(b). In ordinary

> parlance, a kickback is the secret return *to an earlier possessor* of part of a sum received. As the Second Circuit in *Zacher, supra,* interpreted the term in a similar statute, a kickback 'involve[s] a corrupt payment or receipt of payment in violation of the duty imposed by Congress on providers of services to use federal funds only for intended purposes and only in the approved manner.' 586 F.2d at 916. Other federal statutes which prohibit the offer, acceptance, or solicitation of kickbacks are aimed at preventing the corruption of the judgment of a public official [41 U.S.C. Section 51; 26 U.S.C. Sections 952(a)(4), 995(b)(e)(f)(iii), 964(a)] or of some individual who has a specific duty imposed upon him by the Congress [18 U.S.C. Section 1954; 18 U.S.C. Section 874]. We cannot locate any duty imposed upon any of these defendants by a statute or regulation, the violation of which would amount to a misapplication of federal funds. Therefore, we can only conclude that no crime involving kickbacks has been charged or proven. [Footnotes omitted, emphasis as in original.]

United States v. Porter, supra, 591 F.2d at 1054. *See also Boehm v. United States,* 123 F.2d 791, 813 (8th Cir. 1941), wherein "kickback" is defined as the "forced return of part of one's wages."

The holding in *Porter* was buttressed by the 1977 amendment to Sections 1395nn(b) and 1396h which made the description of the crime more specific since

Congress and many United States Attorneys expressed a belief "that the existing language of these penalty statutes [42 U.S.C. Sections 1395nn and 1396h] is unclear and needs clarification." H.R. Rep. No. 95-393(II), 95th Cong., 1st Sess. 53 (1977), reprinted in [1977] U.S. Code Cong. & Admin. News, pp. 3038 3055. Dr. Weingarden was convicted of having violated the 1972 version of Section 1396h(b)(1). Thus, the conclusion of the Fifth Circuit is directly applicable:

> If the meaning of the 1972 version of 42 U.S.C. Section 1395nn(b) was not clear and precise to the Congress and to United States Attorneys charged with enforcing the law, then we are hard put to say, with that degree of confidence required in a criminal conviction, that these defendants were given clear warning by that statute that their conduct was prohibited by it, thus amounting to a criminal act.

United States v. Porter, supra, 591 F.2d at 1054.

Nothing in the legislative history of Section 1396h(b)(1) indicates an intent to proscribe the practice of paying "handling fees," or as charged in the case at bar, "consulting fees." Nor does the common definition of the word "kickback" support the contention of the government that Dr. Weingarden's acceptance of the fees constituted receipt of "kickbacks." No sum was "kicked back" to the doctor. Rather, the laboratories lawfully gave monies to Dr. Weingarden from funds lawfully received by the laboratories from the designated agent of the Department of Health, Education and Welfare. The sums to Dr. Weingarden

from the laboratories did not originate from Dr. Weingarden and thus were not "kickbacks" from an earlier possessor of the funds.

The most recent decision construing Sections 1395nn(b)(1) and 1396h(b)(1) is *United States v. Hancock,* 604 F.2d 999 (7th Cir. 1979). The indictments alleged that defendants Hancock and Palombi used the services of a medical laboratory in their capacity as doctors of chiropractic medicine and received kickbacks from the laboratory for referring Medicare and Medicaid specimens to the laboratory. The defendants pled nolo contendere to the indictments and argued on appeal that the indictments did not sufficiently allege the crime of receiving a kickback.

The Seventh Circuit noted that in *United States v. Zacher, supra,* the terms "bribe" and "kickback" had been defined as involving a "corrupt payment or receipt of payment in violation of the duty imposed by Congress on providers of services to use federal funds only for intended purposes and only in the approved manner." *Hancock, supra,* at 1001. Unlike *Zacher,* however, defendants Hancock and Palombi entered pleas to "indictments [alleging] corrupt payments which were admitted by defendants' pleas." *Id.* Distinguished upon the same basis was *United States v. Porter, supra,* in that *"Porter* . . . found no evidence of corruption or breach of any duty imposed upon the defendants by statute or regulation. Here, in contrast, we review only the sufficiency of the indictments themselves. And we have already concluded that the indictments allege corruption which the defendants admitted by their pleas." *Hancock, supra,* at 1002.

The *Hancock* case is distinguishable from the case at bar in that Dr. Weingarden disavowed any wrongdoing. The doctor's plea was entered pursuant to *North Carolina v. Alford,* 400 U.S. 25 (1970) which authorizes a defendant to enter a plea of guilty while maintaining his innocence. Thus, Dr. Weingarden did not plead to a charge of "corrupt payment." Moreover, Dr. Weingarden was not charged with having received "corrupt payments."

In its relatively cursory analysis of the issue presented, the *Hancock* Court distinguished *Porter* on the further basis that *"Porter* was an appeal after a trial in which the government introduced its evidence in support of the indictment," whereas defendants Hancock and Palombi entered pleas of nolo contendere to the indictment. Without more, such is a distinction without a difference since the Fifth Circuit in *Porter* expressly held that the indictment failed to charge a crime, and thus, reversal would have been mandated even if the defendants had pled guilty to the indictment. Similarly, the fact that Dr. Weingarden pled guilty to the Information does not cure its failure to state an offense.

The *Hancock* decision is questionable on one additional basis. The Seventh Circuit rejected the definition of "bribe" and "kickback" as enunciated by the Second Circuit in *Zacher* and the Fifth Circuit in *Porter,* relying instead upon a definition encompassing a much broader spectrum of conduct, namely "a percentage payment for granting assistance by one in a position to open up or control a source of income." *Hancock, supra,* at 1002. The adoption of such a broad

definition violates the fundamental role of statutory construction relied upon in *Zacher* and *Porter* that criminal statutes are to be strictly construed in favor of the defendant and will not be enlarged by implication or intendment. *Smith v. United States,* 360 U.S. 1 (1959); *Ladner v. United States,* 358 U.S. 169 (1958). Likewise, *Hancock* contravenes the logical extension of the strict construction rule: "if [statutory] words are capable of two constructions, that more favorable to [the accused] prevails." *Ornelas v. United States,* 236 F.2d 392 (9th Cir. 1956), citing *United States v. Resnick,* 299 U.S. 207 (1936) and *United States v. Halseth,* 342 U.S. 277 (1952).

Expressly declining to follow *Porter, Zacher,* and *Boehm,* the trial judge opined that various cases indicate that "kickback" could be construed in the broader sense as "the forwarding of a sum to a third party for services performed for the payor of the kickback by the third party payee (though the payee may not originally have given payor any payment)." Not at issue in any of the cases cited by the lower court was the definition of "kickback" as an essential element of a criminal charge. The general statements in those cases regarding the term "kickback," standing alone, do not address the controlling question and must be considered in the proper context of the opinion in which they appear. Expressions in an opinion are to be considered in the light of the factual context of the case. *Cohens v. Virginia,* 19 U.S. 120, 179 (1821). None of the cases cited below is dispositive of the issue at bar. For example: *United States v. Engle,* 458 F.2d 1017 (8th Cir. 1972) was an income tax evasion case. The defendant was not charged with having received "kickbacks." The sole reference to the term arose during the testimony of a

government witness who denominated as "kickbacks" payments received by the defendant from a vending company which installed its machines in restaurants operated by the defendant. On appeal, the defendant claimed that the characterization mandated a mistrial. Rejecting the claim, the appellate court noted that the trial court has stricken the witness' reference and admonished the jury to disregard it. In dicta, the Court "suspected" that the witness' use of the term was warranted, but did not adjudicate the appropriate definition to be afforded one charged with having received "kickbacks." In *United States v. Brewster*, 408 U.S. 501 (1972), the Court in a footnote "string-citation" parenthetically characterized *United States v. Bramblett*, 348 U.S. 503 (1955) as a criminal prosecution arising from a "Congressman's misuse of office funds via a 'kick-back' scheme." 348 U.S. at 522, n. 16. The reference in *Brewster* to *Bramblett* was not for the purpose of defining "kickback." Rather, the point at issue was whether the scheme in *Bramblett* was "related" to the Congressman's legislative office, thereby indicating that absolute congressional immunity does not exist as a bar to criminal prosecution. *Powell v. McCormack*, 395 U.S. 486, 525 (1969) involved the impropriety of the unseating of Congressman Adam Clayton Powell. In the context of historical background, the Court noted that Robert Walpole was the first re-elected member of the House of Commons who had been expelled "for receiving kickbacks for contracts relating to 'foraging the troops,' . . . ." 395 U.S. at 525. Walpole's activities, which are not further detailed, are hardly determinative of the issue at bar, namely, the definition of "kickback" within the context of the Medicaid statute. The remaining

cases cited by the trial court, *United States v. Acme Process Equipment Co.*, 385 U.S. 1138 (1966); *United States v. Carbone*, 327 U.S. 633 (1946); *United States v. Foster*, 566 F.2d 1045 (6th Cir. 1977); *In re Grand Jury Proceedings, Detroit, Michigan, August 1977*, 570 F.2d 562 (6th Cir. 1978); *United States v. Joseph*, 533 F.2d 282 (5th Cir. 1976); *United States v. Beasley*, 550 F.2d 261 (5th Cir. 1977); *United States v. Godwin*, 566 F.2d 975 (5th Cir. 1978); *ITT Community Development Corp. v. Barton*, 569 F.2d 1351 (5th Cir. 1978; *United States v. Bush*, 503 F.2d 813 (5th Cir. 1974); *United States v. Addonizio*, 451 F.2d 49 (3d Cir. 1971); and *Maheu v. Hughes Tool Co.*, 569 F.2d 459 (9th Cir. 1977), are distinguishable for the same reasons. In not one of those cases did the court construe the term "kickback" within the context of a criminal statute. The lower court chose to rely on these general characterizations afforded the term "kickback" in its Opinion and Order Denying Defendants' Motion for Rehearing in the face of two Circuit Court opinions, *Zacher* and *Porter*, which construed "kickback" within the meaning of the Medicaid statute. The failure to follow *Zacher* and *Porter* conflicts with the principle of strict construction which requires adoption of the definition of "kickback" which favors the defendant and does not enlarge the scope of the statute. As previously noted, if a statutory word is capable of two constructions, that more favorable to the accused prevails. *Ornelas v. United States, supra.*

Not only is the rule of strict construction applicable to this case for the reason that a criminal statute is involved, but also for the reason that the acts allegedly prohibited, payments by laboratories to doctors, were lawful at common law, are presently lawful in non-

Medicaid matters, and the statute in question is thus in derogation of common law and common law rights. Statutes which restrain the freedom of contract, *New England Mut. Life Ins. Co. v. Mitchell,* 118 F.2d 414 (4th Cir. 1941), or restrain the exercise of any trade, profession, or business, are in derogation of the common law. *West Virginia Board of Dental Examiners v. Storch,* 122 S.W.2d 295 (W. Va. 1961). A common law right may not be changed by doubtful implication, *White v. Hopkins,* 51 F.2d 159 (5th Cir. 1931), and statutes in derogation of the common law or common rights must be strictly construed. *Charney v. Thomas,* 372 F.2d 97 (10th Cir. 1967). Strict construction of Section 1396h(b)(1), as required by all of these principles, mandates that the definition of kickbacks supplied by the Seventh and Fifth Circuits in *Zacher* and *Porter,* respectively, is the proper one to be applied in this case. As such, the Information fails to charge Dr. Weingarden with an offense.

II.

THE CONFLICT AMONG THE CIRCUITS SHOULD BE RESOLVED, THE DECISION REACHED IN THE SIXTH CIRCUIT SHOULD BE OVERRULED AND THE RESULT REACHED BY THE FIFTH CIRCUIT SHOULD BE ADOPTED.

CONFLICTS IN CIRCUITS

The definition of the term "kickback" as set forth in Section 1396h(b)(1) must be construed in the ordinary and common sense meaning. The Seventh Circuit's

position concerning its interpretation of this word of art conflicts with the two other Circuits which have defined the term "kickback" as meaning a secret return of funds or monies to an earlier possessor.

The cases of *United States v. Porter, supra.,* and *United States v. Zacher, supra.,* decided by the Fifth and Second Circuits respectively support Petitioner's argument. The Seventh Circuit, the only other Circuit to decide this terminology, has interpreted "kickback" in a contrary manner.

As a result of the different interpretation among the Circuits, due process requires the Court to reconcile the disparity which has been created.

CONCLUSION

The need to apply the rules of statutory construction in a uniform manner necessitates this Court's interpretation in order that fundamental fairness as well as due process be accorded the Petitioner. To strive for uniformity in the application of the laws is paramount in our system of jurisprudence.

The empirical facts appear to warrant a finding that the application of the definition of the term "kickback" accepted by the Seventh Circuit, is at odds with the definition most commonly accepted in legal parlance. This disparity should be resolved in the Petitioner's behalf.

Respectively submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Certiorari was mailed to the office of FRANCIS L. ZEBOT, U.S. Attorney's Office, 839 Federal Building, Detroit, Michigan 48226, and WADE H. McCREE, JR., Solicitor General of the United States, Washington, D.C. 20530, this 17th 29 day of September, 1980.

Neal L. Lewis

NEAL R. LEWIS
of Counsel

Appendix

APPENDIX A

Nos. 79-5222-24, 79-5269-70

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RICHARD TAPERT, HARVEY GOLDEN, GERALD WEINGARDEN, DONALD FREEDLANDER and ROBERT GASH,
Defendants-Appellants.

APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed June 16, 1980.

Before: WEICK and JONES, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

PHILLIPS, Senior Circuit Judge, delivered the opinion of the Court, in which WEICK, Circuit Judge, joined. JONES, (pp. 18-20) filed a separate concurring opinion.

PHILLIPS, Senior Circuit Judge. These are consolidated appeals by five Detroit osteopathic physicians who were convicted of receiving kickbacks for sending urine and blood samples of their patients to Titan Laboratories (Titan) for analysis. All five of the physicians were enrolled in the Medicare and Medicaid programs and the charges for the laboratory analysis were paid to Titan out of Medicare and Medicaid funds. The district court held that the payments violated

the original version of 42 U.S.C. § 1936h(b),[1] which was in effect during the years involved in this case. In 1977 Congress amended the statute so as to remove any possible doubt that conduct such as that involved in the present case violates the Act.[2]

The principal issues on this appeal are whether the information under which appellants were convicted charges a vio-

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[1] (b) Whoever furnishes items or services to an individual for which payment is or may be made in whole or in part out of Federal funds under a State plan approved under this title [42 USCS §§ 1396-1396d, 1396f-1396i] and who solicits, offers, or receives any —

(1) kickback or bribe in connection with the furnishing of such items or services or the making or receipt of such payment, or

(2) rebate of any fee or charge for referring any such individual to another person for the furnishing of such items or services

shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

[2] The amended § 1396h(b)(1) is as follows:

(b)(1) Whoever solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind—

(A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under this subchapter, or

(B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under this subchapter,

shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.

(2) Whoever offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person—

(A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under this subchapter, or

(B) to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility,

lation of the pre-1977 version of 42 U.S.C. § 1396h(b)(1) (note one), and whether the statute is unconstitutional for vagueness. Then Chief District Judge Cornelia Kennedy, now a judge of this court, ruled that the payments to the doctors were kickbacks, that the information charges a violation of the statute and that the statute is not invalid for vagueness. We affirm.

I

Apparently Titan initiated the arrangement for the kickbacks, by having its representative contact one of the physicians.[3] In return for payments from Titan or one of its affiliates, the physician agreed to send his patients' specimens to Titan and to encourage his colleagues to do the same. Other physicians entered into similar agreements, which Titan described as "consulting" arrangements. This pattern of activity began in April 1974 and continued until January 1978.

Beginning in 1976, the physicians began depositing their Titan checks in an escrow fund for the purpose of acquiring an interest in Titan. The fund was administered by J.K.F. Inc., a corporation set up by the physicians to hold the Titan

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service, or item for which payment may be made in whole or in part under this subchapter,

shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.

(3) Paragraphs (1) and (2) shall not apply to—

(A) a discount or other reduction in price obtained by a provider of services or other entity under this subchapter if the reduction in price is properly disclosed and appropriately reflected in the costs claimed or charges made by the provider or entity under this subchapter; and

(B) any amount paid by an employer to an employee (who has a bona fide employment relationship with such employer) for employment in the provision of covered items or services.

[3] *See United States* v. *Shermetaro*, —— F.2d —— (No. 79-5148, 6th Cir. 1980), in which this court affirmed the conviction of one of the parties to this scheme under 18 U.S.C. § 371 for conspiracy to defraud the United States by obstructing the collection of income taxes from Titan Laboratories.

stock they proposed to buy. When the escrow fund reached $60,000, the physicians contributed an additional $15,000 and J.K.F. Inc. acquired a 40 per cent interest in Titan.

On September 21, 1978, a federal grand jury returned a 37 count indictment against appellants, five other individuals and three Michigan corporations. On February 2, 1979, the Government filed a 42 count follow-up information charging appellants with soliciting and receiving Medicare and Medicaid kickbacks from Titan and associated entities. The information thereafter was amended. The version under which appellants were convicted is referred to in the record as the Amended Follow-Up Information.

Judge Kennedy denied the motions of appellants to dismiss the indictments. Thereafter, in a published opinion, she denied their motions for a rehearing. *United States* v. *Weingarden*, 468 F.Supp. 410 (E.D. Mich. 1979). In this opinion Judge Kennedy held that the pre-1977 version 42 U.S.C. § 1396h(b)(1) prohibited the conduct charged in the information, and that the challenged statute was sufficiently clear to give to appellants adequate notice that their alleged conduct was illegal.

Thereafter, under a plea bargaining agreement, each of the appellants entered a plea of guilty to certain counts of the information applicable to him. The Government approved dismissal of the indictment.

II

Prior to their guilty pleas, the appellants gave notice that they intended to appeal the ruling of the district court on the applicability of § 1396h(b)(1). To preserve the issue for appeal, they moved for arrest of judgment under Fed. R. Crim. P. 34 on the ground that the statute did not apply to their conduct and the district court, therefore, had no jurisdiction to accept their guilty pleas. This is the procedure approved by this court in *United States* v. *Heller*, 579 F.2d

990, 992-93, and n. 1 (6th Cir. 1978). *See also North Carolina* v. *Alford*, 400 U.S. 25, 37-38 (1970); *United States* v. *Cox*, 464 F.2d 927, 941 (6th Cir. 1972). The Government concedes that the alleged defects raised by appellants are jurisdictional and not waived by their guilty pleas. Consequently the legal issue is properly before this court.

III

Dr. Gerald Weingarden entered a plea of guilty to Counts three through seven of the amended follow-up information, which are as follows:

> On or about the dates listed below, in the Eastern District of Michigan, Gerald Weingarden, D.O., having obtained services from Titan Laboratories, Inc., for which payment was to be made in part out of federal funds under a state plan approved under Title XIX of the Social Security Act, did knowingly and wilfully solicit and receive kickback payments from Titan Laboratories, Inc., Spartan Laboratories, Inc., and M. A. Delaney, Inc., as detailed below in connection with the furnishing of the aforesaid services, each payment being a separate count of this indictment.
>
> To wit, the Government contends Gerald Weingarden, received monetary payments labelled "consulting fees" from an entity related to Titan Laboratories, Inc., namely Spartan Laboratories, Inc., principally to induce the defendant to send his laboratory work to Titan. In addition, it was agreed that the defendant would perform the following services: (1) to form and assist in the formation of J.K.F., Inc., as described in indictment Number 78-80689, and (2) to encourage other doctors to send their laboratory work to Titan, as described in Indictment Number 78-80689.
>
> Gerald Weingarden visited Titan Laboratories, Inc., from time to time, in connection with the performance of the above-described services.

The claims filed by Titan Laboratories, Inc., were in accordance with the Medicaid statutes and regulations, and the monies received by Titan Laboratories, Inc., were those to which Titan Laboratories, Inc., was entitled. That is, when Titan Laboratories, Inc., was asking for payment for specific blood work, that blood work had been done, and that the billing for that blood work was in accordance with medicaid statutes and regulations.

Count	Approximate Date of Payment	Amount of Money	Source of Payment
3	October 27, 1976	$1,000	Spartan Laboratories, Inc.
4	November 22, 1976	$1,000	Spartan Laboratories, Inc.
5	December 28, 1976	$1,000	Spartan Laboratories, Inc.
6	March 1, 1977	$1,000	Spartan Laboratories, Inc.
7	March 1, 1977	$1,000	Spartan Laboratories, Inc.

All in violation of Title 42, U.S.C., Section 1396h(b)(1).

At his Rule 11 sentencing hearing, Dr. Weingarden admitted that he had committed the acts charged in the information.

Dr. Harvey Golden entered a plea of guilty to counts 11 through 15 of the Information, which charged as follows:

On or about the dates listed below, in the Eastern District of Michigan, Harvey Golden, D.O., having obtained services from Titan Laboratories, Inc., for which payment was to be made in part out of federal funds under a state plan approved under Title XIX of the Social Security Act, did knowingly and wilfully solicit and receive kickback payments from Titan Laboratories, Inc., and Media Technology, Inc., as detailed below in connection with the furnishing of the aforesaid services, each payment being a separate count of this indictment.

To wit, Harvey O. Golden D.O., received monetary payments from Titan Laboratories, Inc., in exchange for referring his laboratory work to Titan Laboratories, Inc. The claims filed by Titan Laboratories, Inc., were in accordance with the Medicaid statutes and regulations, and the monies received by Titan Laboratories, Inc., were

those to which Titan Laboratories, Inc., were entitled. That is, when Titan Laboratories, Inc., was asking for payment for specific blood work, that blood work had been done, and that the billing for that blood work was in accordance with Medicaid statutes and regulations.

Count	Approximate Date of Payment	Amount of Money	Source of Payment
11	May 27, 1974	$850	Titan Laboratories, Inc.
12	August 8, 1974	$900	Media Technology, Inc.
13	September 3, 1974	$1,500	Titan Laboratories, Inc.
14	October 24, 1974	$1,600	Titan Laboratories, Inc.
15	December 6, 1974	$1,500	Titan Laboratories, Inc.

All in violation of Title 42, U.S.C., Section 1396h(b)(1).

At his Rule 11 sentencing hearing, Dr. Golden testified as follows:

THE COURT: Knowing those things, how do you wish to plead at this time to Counts 11, 12, 13, 14, 15?

DEFENDANT GOLDEN: Guilty, your Honor.

THE COURT: Will you tell me in your own words what it is that you did do that causes you to plead guilty?

DEFENDANT GOLDEN: Part of my motives I stated, perhaps an equal amount of my motives were for the inducement of monetary gain.

THE COURT: In other words, to receive payment from Titan for sending work to Titan?

DEFENDANT GOLDEN: Yes.

THE COURT: And some of that work at least was Medicare and Medicaid work?

DEFENDANT GOLDEN: Yes, your Honor.

THE COURT: Would that be true for all of the periods involved here, May 27, 1974, through December 6, 1974?

DEFENDANT GOLDEN: Yes, your Honor.

Dr. Donald Freedlander entered a plea of guilty to counts 17 through 21 of the Information, which charged as follows:

On or about the dates listed below, in the Eastern District of Michigan, Donald Freedlander, D.O., having obtained services from Titan Laboratories, Inc., for which payment was to be made in part out of federal funds under a state plan approved under Title XIX of the Social Security Act, did knowingly and wilfully solicit and receive kickback payments from Titan Laboratories, Inc., and M. A. Delaney, Inc., as detailed below in connection with the furnishing of the aforesaid services, each payment being a separate count of this indictment.

To wit, the Government contends Donald Freedlander, D.O., received monetary payments from an entity related to Titan Laboratories, Inc., namely M. A. Delaney, Inc., principally to induce Donald Freedlander, D.O., to send his laboratory work to Titan Laboratories, Inc. In addition, it was agreed that Donald Freedlander would perform the following services:

(1) to form and assist in the formation of J.K.F., Inc., as described in Indictment Number 78-80689, and (2) to encourage other doctors to send their laboratory work to Titan Laboratories, Inc., as described in Indictment Number 78-80689.

The claims filed by Titan Laboratories, Inc., were in accordance with the Medicaid statutes and regulations, and the monies received by Titan Laboratories, Inc., were those to which Titan Laboratories, Inc., were entitled.

That is, when Titan Laboratories, Inc., was asking for payment for specific blood work, that blood work had been done, and that the billing for that blood work was in accordance with Medicaid statutes and regulations.

Count	Approximate Date of Payment	Amount of Money	Source of Payment
17	August 23, 1976	$200	M. A. Delaney, Inc.
18	August 23, 1976	$200	M. A. Delaney, Inc.
19	September 7, 1976	$200	M. A. Delaney, Inc.
20	September 10, 1976	$200	M. A. Delaney, Inc.
21	September 15, 1976	$200	M. A. Delaney, Inc.

All in violation of Title 42, U.S.C., Section 1396h(b)(1).

At his Rule 11 sentencing hearing, Dr. Freedlander testified as follows:

> THE COURT: Will you tell me what it was that you did on or about the dates mentioned that causes you to plead guilty? What did you do on or about August 23rd, 1976, with regard to these checks apparently from M. A. Delaney, Inc.?
>
> DEFENDANT FREEDLANDER: These checks were received by me, yes, your Honor, they were received by me.
>
> THE COURT: You received the checks described in Counts 17, 18, 19, 20, 21?
>
> DEFENDANT FREEDLANDER: Yes, I did, your Honor.
>
> THE COURT: From M. A. Delaney?
>
> DEFENDANT FREEDLANDER: Yes, I did.
>
> THE COURT: And did you have some relationship at least with Titan Laboratories as stated in the information?
>
> DEFENDANT FREEDLANDER: Yes, I did, your Honor.
>
> THE COURT: And did that include some kind of business involving Medicare and Medicaid?
>
> DEFENDANT FREEDLANDER: Right.
>
> THE COURT: In other words, this was business with Titan Laboratories that included some business relating to Medicare and Medicaid samples?
>
> DEFENDANT FREEDLANDER: Yes, your Honor.
>
> THE COURT: Did you receive these payments for sending work to Titan Laboratories?
>
> DEFENDANT FREEDLANDER: Yes, I did, your Honor.
>
> THE COURT: Did you perform any services for these companies, M. A. Delaney and Titan Lab?
>
> DEFENDANT FREEDLANDER: Yes, I did, your Honor. I helped with the formation and was of assistance to the J.K.F. Corporation.
>
> • • •

THE COURT: You have said something about, among other things, and that was kind of confusing to me, except for setting up J.K.F. Corporation, did you provide any other services to Titan Laboratories?

DEFENDANT FREEDLANDER: Yes, among other things, I encouraged other physicians to send their work to the laboratory.

THE COURT: In other words, there may not be a factual basis for this plea other than the statement that you in fact performed services besides sending business to Titan Lab?

MR. FINK: I think under the general intent statute, I don't think there has to be a dominant purpose, your Honor. He has indicated that that was one of the things he received consideration for.

THE COURT: As long as it is clear, and I am not so sure it is clear from the statement, was one of the reasons that you received these payments from Titan Lab, or from M. A. Delaney, Inc., because you were sending your lab business to Titan Laboratories, was that one of the reasons?

DEFENDANT FREEDLANDER: In the total, yes, it was. It was part of it. It was one of the reasons.

• • •

THE COURT: In view of the fact it uses the word wilfully and that there were other considerations, I think we should at least really know what he does wish to plead guilty. I have a little problem with the factual basis under his statement. Maybe I can ask him this question.

Was the referral of business to Titan Laboratories a substantial or significant reason?

DR. FREEDLANDER: They were among the reasons, you know, a combination as to the rest of it, why, I received the compensation, yes, your Honor.

THE COURT: I am still trying to find out if it was significant at all or was it just minor?

DEFENDANT FREEDLANDER: Well, when I say significant, your Honor, there are several components involved. Is this more strongly than this one or that

one, as the case may be, as I say, I did give my blood work to the laboratory, I did help assist them, I did help in getting other doctors referred to them, and with the combination of everything I don't know where to put the weight on each one as to compensation, but all were done by me, that is true, and I did receive the compensation.

MR. FINK: Your Honor, the 1952 cases that you are familiar with, the Interstate travel in aid of racketeering cases, which are specific intent crimes, which I don't think this is, do not require the dominant purpose to be the travel, it can be a co-equal purpose.

THE COURT: Is he going to say it was co-equal with the other things?

DEFENDANT FREEDLANDER: With the other things, yes.

• • •

THE COURT: As long as we get something that was co-equal with other services of recruiting doctors and helping to form this other corporation, the three of them would be co-equal?

DEFENDANT FREEDLANDER: Yes, your Honor.

THE COURT: I think that that is sufficient for that.

• • •

THE COURT: I think I should ascertain that.

Did you, in fact, submit blood samples to Titan Laboratories?

DEFENDANT FREEDLANDER: That I did, your Honor.

THE COURT: And they were from Medicare and Medicaid patients?

DEFENDANT FREEDLANDER: Yes, they were.

MR. ROSEN: That's sufficient.

THE COURT: I think I asked that but maybe not so directly.

MR. ROSEN: I have nothing further.

THE COURT: And that was during the time period of these checks that were received from M. A. Delaney?

DEFENDANT FREEDLANDER: Yes, they were, your Honor.

THE COURT: And the payments from M. A. Delaney were for the three purposes: One because you sent your lab work to Titan; two, because they indicated tests; and, three, you were supplying other doctors to send their work to J.K.F. and/or others?

DEFENDANT FREEDLANDER: Yes, your Honor.

THE COURT: And you did what you did knowingly?

DEFENDANT FREEDLANDER: Yes, I did, your Honor.

THE COURT: Having discussed these matters this afternoon, do you still wish to plead guilty to Counts 17, 18, 19, 20 and 21?

DEFENDANT FREEDLANDER: Yes, I do.

Dr. Richard Tapert entered a plea of guilty to counts 27 through 31 of the Information, which charged as follows:

On or about the dates listed below, in the Eastern District of Michigan, Richard Tapert, D.O., having obtained services from Titan Laboratories, Inc., for which payment was to be made in part out of federal funds under a state plan approved under Title XIX of the Social Security Act, did knowingly and wilfully solicit and receive kickback payments from Titan Laboratories, Inc., and Associated Physicians Services Co., as detailed below in connection with the furnishing of the aforesaid services, each payment being a separate count of this indictment.

To wit, Richard Tapert, D.O., received monetary payments from an entity related to Titan Laboratories, Inc., namely Associated Physicians Services Company, in exchange for referring his laboratory work to Titan Laboratories, Inc. The claims filed by Titan Laboratories, Inc., were in accordance with the Medicaid statutes and regulations and the monies received by Titan Laboratories, Inc., were those to which Titan Laboratories, Inc., was

entitled. That is, when Titan Laboratories, was asking for payment for specific blood work was in accordance with Medicaid statutes and regulations.

Count	Approximate Date of Payment	Amount of Money	Source of Payment
27	June 24, 1975	$200	Associated Physicians Services, Co.
28	August 12, 1975	$200	Associated Physicians Services, Co.
29	September 9, 1975	$500	Associated Physicians Services, Co.
30	October 17, 1975	$200	Associated Physicians Services, Co.
31	December 10, 1975	$200	Associated Physicians Services, Co.

All in violation of Title 42, U.S.C., Section 1396h(b)(1).

At his Rule 11 sentencing hearing, Dr. Tapert testified as follows:

THE COURT: How do you plead to counts 27 through 31?

THE DEFENDANT: I plead guilty.

THE COURT: Will you tell me what it was that you did do that causes you to plead guilty to those counts?

THE DEFENDANT: I accepted monetary payments from Associated Physicians Service Company in exchange for referring my laboratory work to Titan Laboratory.

THE COURT: And did you do that knowingly?

THE DEFENDANT: Yes, I did.

THE COURT: Are there any other questions the Government would like me to ask?

MR. ROSEN: Maybe your Honor could inquire as to the taking of blood samples from Medicare-Medicaid patients.

THE COURT: Yes, during this period of time that these payments were made, was some of the work that you were referring to Titan Laboratory or Associated Physicians Medicare and Medicaid work?

THE DEFENDANT: Yes.
THE COURT: For Medicare and Medicaid patients?
THE DEFENDANT: That is correct.
THE COURT: And would that be true during the period of each of these payments
THE DEFENDANT: Yes.
THE COURT: Any other questions, Mr. Rosen
MR. ROSEN: No, your Honor.
THE COURT: Have you had plenty of time to discuss this matter with your attorney?
THE DEFENDANT: Yes, I have.
THE COURT: And he has explained to you what it is the Government has to prove to prove you guilty?
THE DEFENDANT: Yes.
THE COURT: And you understand also that this is a final disposition insofar as this Court is concerned, that this plea of guilty, if the Court accepts it, it will not set aside the plea of guilty should an appeal be unsuccessful on the legal issues, do you understand?
THE DEFENDANT: I understand.
THE COURT: Having discussed these matters this afternoon, do you still wish to plead guilty to these counts?
THE DEFENDANT: Yes, I do.

Dr. Robert Gash entered a plea of guilty to count 36 of the Information, which charged as follows:

> On or about the dates listed below, in the Eastern District of Michigan, Robert Gash, D.O., having obtained services from Titan Laboratories, Inc., for which payment was to be made in part out of federal funds under a state plan approved under Title XIX of the Social Security Act, did knowingly and wilfully solicit and receive kickback payments from Titan Laboratories, Inc., and Associated Physicians Services, Co., as detailed below in connection with the furnishing of the aforesaid services, each payment being a separate count of this indictment.

To wit, Robert Gash, D.O., received monetary payments from an entity related to Titan Laboratories, Inc., namely Associated Physicians Services Company, in exchange for referring his laboratory work to Titan Laboratories, Inc. The claims filed by Titan were in accordance with the Medicaid statutes and regulations and the monies received by Titan Laboratories, Inc., was entitled. That is, when Titan Laboratories, Inc., was asking for payment for specific blood work was in accordance with Medicaid statutes and regulations.

Count	Approximate Date of Payment	Amount of Money	Source of Payment
36	August 11, 1975	$200	Associated Physicians Services, Co.

All in violation of Title 42, U.S.C., Section 1396h(b)(1).

In his Rule 11 sentencing hearing, Dr. Gash testified as follows:

THE COURT: Will you tell me what you did on or about August 11, 1975 that causes you to plead guilty?

DEFENDANT GASH: On or about August 11, 1975, I received a check for $200.00 from Associated Physicians Services, Inc., for submission of lab work to Titan Laboratories.

THE COURT: To Titan Laboratories?

DEFENDANT GASH: Yes.

THE COURT: And was some of that lab work at least lab work under both Medicare and Medicaid?

DEFENDANT GASH: I would have to assume so. I really don't know that, your Honor.

THE COURT: But ordinarily there would be some within the work that you would submit within a month?

DEFENDANT GASH: I would say so, yes.

THE COURT: Does the Government have some evidence that some of this was?

MR. ROSEN: Yes, it does, your Honor.

THE COURT: Are there any other questions you would like to ask?

MR. ROSEN: No, your Honor.

THE COURT: Having discussed this matter this afternoon, do you still wish to plead guilty to Count 36?

DEFENDANT GASH: Yes, your Honor.

IV

In asserting that the statute was not sufficiently broad prior to the 1977 amendment to make their activities a criminal offense, and that the statute under which they were convicted is invalid for vagueness, appellants rely strongly upon the fact that Congress found it necessary to enact the 1977 amendment.

An amendment to an existing statute is not an acknowledgment by Congress that the original statute is invalid. It is a common and customary legislative procedure to enact amendments strengthening and clarifying existing laws.

The report of the House Committee on Ways and Means contains the following statement on the purpose of the 1977 amendment:

> Your committee bill would modify the penalty provisions *in existing law* which relate to those persons providing services under medicare and medicaid.
>
> *Existing law* provides specific penalties under the medicare and medicaid programs for certain practices that long have been regarded by professional organizations as unethical, which are unlawful in some jurisdictions, and which contribute significantly to cost of the programs. Such practices as the submission of false claims, or the soliciting, offering, or *acceptance of kickbacks* or bribes, *including rebates or [sic] a portion of fees or charges for patient referrals, are misdemeanors under present law* . . .
>
> Recent hearing and reports, however, indicate that such penalties have not proved adequate deterrents against illegal practices by some individuals who provide services under medicare and medicaid. In addition, these misdemeanor penalties appear inconsistent with

> existing Federal criminal code sanctions which make similar actions punishable as felonies. Also, it has been brought to the attention of the committee by the U.S. Attorney's offices which have utilized these Social Security Act sanctions in the prosecution of medicare and medicaid fraud cases that the existing language of these penalty statutes is unclear and needs clarification.
>
> Your committee's bill would strengthen the penalty provisions *in existing law* which relate to persons providing services under medicare and medicaid . . .
>
> In addition, the bill would *clarify and restructure* those *provisions in existing law* which define the types of financial arrangements and conduct to be classified as illegal under medicare and medicaid. (Emphasis added.) H.R. Rep. No. 95-393(II), 95th Cong., 1st Sess. *reprinted in* (1977) U.S. Code Cong. & Ad. News 3039, 3055.

We agree with the definition of "kickbacks" adopted and applied by the Seventh Circuit in *United States* v. *Hancock*, 604 F.2d 699 (7th Cir. 1978). We follow that decision in affirming the decision of the district court that appellants have entered pleas of guilty under an Information charging them with violations of a valid statute which made their conduct a criminal offense. The record demonstrates to our satisfaction that the payments which the appellants admitted receiving were "kickbacks" within the meaning of the statute.

We choose to follow the Seventh Circuit in *Hancock*, rather than *United States* v. *Porter*, 591 F.2d 1048 (5th Cir. 1979). The reasons for this conclusion are stated well by Judge Kennedy in her published opinion. 468 F.Supp. at 412-15.

Appellants contend that they did not "furnish" the services in connection with which they received payments, and that the Information does not charge an offense. These and all other contentions made by appellants have been considered and found to be without merit.

The convictions are affirmed.

JONES, Circuit Judge, concurring. I agree that the term "kickback" should be defined to include "a percentage payment for granting assistance by one in a position to open up or control a source of income." *United States* v. *Hancock*, 604 F.2d 999, 1002 (7th Cir. 1978). The United States has an important interest in securing the honest administration of federally funded programs. *United States* v. *Thompson*, 366 F.2d 167 (6th Cir.), *cert. denied*, 385 U.S. 973 (1966). I write separately to discuss a substantial issue of first impression concerning the construction of 42 U.S.C. § 1396h (b) (1) (1972): Is a physician, who provides services to medicaid patients and who receives illegal kickbacks from laboratories for the referral of those patients, for which referrals federal funds do not reimburse the doctor or the laboratory, a person who "*furnishes* items or services to an individual *for which* payment is or may be made in whole or part out of Federal funds . . . *and* who . . . receives any (1) kickback . . . *in connection* with the furnishing of *such* items or services . . .?" I concur with the majority's affirmative answer.

The language of the amended informations and the guilty pleas, as thoroughly reported in the majority opinion, define the facts of the case.[1] The defendants were charged with and pleaded guilty to receiving payments in various forms from a laboratory for patient referrals. The informations allege that the defendants "obtained services" from a laboratory, for which services medicaid would pay in part, and that the

[1] According to my construction of § 1396h (b) (1), the amended informations do state an offense. In his zeal to uphold the guilty pleas, the Assistant United States Attorney argued seriously that this Court should consider the amended informations to have been informally amended by oral argument and by his response to the defendants' motion to dismiss the informations. Further, he contended that the district court had *implicitly* granted leave for this informal second amendment. The Government's position is not supported in the record and is an attempt to play "fast and loose" with the established rules of criminal procedure and principles of due process. Such overly zealous advocacy should be tempered. In other respects, the Assistant United States Attorney prepared a fine brief.

defendants received kickbacks in connection with these services. Consequently, the relevant services for which federal funds were paid are the tests performed by the laboratory. The record also establishes that the defendants were reimbursed by medicaid for their treatment of the same patients referred to the laboratories.

The facts raise two questions of statutory interpretation: 1) did the physicians "furnish" the laboratory services; and 2) were the kickbacks paid "in connection with" the laboratory services rather than just the patient referrals? Defendants argue that they did not "furnish" the laboratory services, since the laboratory actually performed the tests. They point out that their services were reimbursed separately from the laboratory tests. Second, they argue that the kickbacks were paid "in connection with" the patient referrals rather than any service for which medicaid funds were paid. They declare that the kickbacks did not affect their treatment of patients or the laboratory's performance of tests.

It is fair to say that physicians in Michigan in 1976-1977 furnished the laboratory services to their patients. The physicians took the specimens and sent them to a laboratory. A laboratory could act only on orders from the physicians. Mich. Comp. Laws Ann. §§ 325.81(b), 325.89(b), repealed by Mich. Comp. Laws Ann. § 333.20501 *et seq.* (1978); *cf.* 42 C.F.R. § 405.1316(e) (Medicare regulations). The laboratory could report the test results only to the physicians, unless they instructed otherwise. Mich. Adm. Code R. 325.2353(2) (Rule 53); *cf.* 42 C.F.R. § 405.1316(g) (Medicare regulations). The physicians bore the responsibility of interpreting the test data. In short, the physicians did everything but actually perform the clinical tests. Under these circumstances, by interpreting the word "furnish" according to its common usage to mean "supply or provide", I would hold that the physicians did "furnish" the laboratory services.

The physicians received the kickbacks "in connection with" the laboratory services. The statute is satisfied if there is

a logical relationship between the kickbacks and the services for which federal funds were paid. In our case, the kickbacks were an agreed part of the performance of the laboratory services. The relationship between the physicians and the laboratory was formed around the payment of the kickbacks. The physicians chose to refer patients to a specific laboratory because of the negotiated kickback payments. The phrase "in connection with" has a sufficiently broad meaning in common parlance to conclude that the kickbacks were received "in connection with" the laboratory services.

The legislative history bolsters my interpretation of § 1396h (b) (1) as enacted in 1972. Congress intended to prohibit in the administration of the Medicaid program any practices which were unethical or were proscribed by state law. H. R. Rep. No. 92-231, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 4989, 5007, 5093, 5308. The physicians' receipt of kickbacks for patient referrals to the laboratory is forbidden by both Section 21 of the Code of Ethics of the Michigan Association of Osteopathic Physicians and Surgeons and by state statute, Mich. Comp. Laws Ann. § 445.162. Similarly, a laboratory is prohibited from soliciting business by paying kickbacks. Mich. Comp. Laws Ann. § 333.20525(c) (1978). Since the language of the statute permits, § 1396h (b) (1) should be interpreted to effectuate congressional intent. *Barrett* v. *United States*, 423 U.S. 212 (1976); *United States* v. *Tarter*, 522 F.2d 520 (6th Cir. 1975). The ordinary meaning of the statutory language and the 1972 legislative history compel the conclusion that the physicians' receipt of kickbacks under the circumstances in this case is a violation of § 1396h (b) (1).

Finally, because the ordinary meaning of the plain language of § 1396h (b) (1) would have notified the defendants that their conduct was unlawful, the statute is not unconstitutionally vague. *United States* v. *Hancock*, 604 F.2d at 1002.

Accordingly, I concur with the opinion and judgment of the majority.

APPENDIX B

No. 79-5224

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

GERALD WEINGARDEN,
Defendant-Appellee.

ORDER DENYING PETITION FOR REHEARING

Before WEICK and JONES, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

The court having not favored rehearing en banc in this case, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

Entered by order of the court.

Signature Illegible
CLERK